IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 44

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,

Petitioner,

v.

WILLIAM J. ROCHELLE, JR., Trustee,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OCTOBER TERM, 1964

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a loss-carryback refund forthcoming under federal income tax statutes (Internal Revenue Code of 1954, Sec. 172) as a result of losses sustained prior to bankruptcy pass to the estate as "property" under Section 70a(5) of the Bankruptcy Act, or belongs to the bankrupt.

STATEMENT

The petitioner's statement (Petition, pp. 2-4) is correct. For completeness, however, we would add that the adjustments were, in large part, for losses sustained prior to the date of bankruptcy.

ARGUMENT

Petitioner correctly states that the decision below is in direct conflict with the decision of the Third Circuit in *In re Sussman*, 289 F. 2d 76 (1961), and the decision of the First Circuit in *Fournier v. Rosenbloom*, 318 F. 2d 525 (1963), which in effect followed the *Sussman* case.

The petition should not be granted, however.

First, the question presented is not of sufficient general significance or importance to require a decision of this Court. It has been considered in the circuits only three times in the more than twenty years since the creation of the net operating loss-carryback in 1942.

Second, the Court of Appeals correctly held in the present case that an inchoate right to receive a loss-carryback refund is "property" which the bankrupts could "by any means have transferred" within the meaning of Sec. 70a(5) of the Bankruptcy Act, thus entitling the creditors of the bankrupts, and not the bankrupts, to the loss-carryback refunds. A contrary decision would, as even the courts

whose decisions conflict with the present holding admit, allow an undeserved windfall to the bankrupt.

The original *Sussman* decision was criticized as wholly unnecessary by contemporary critics at the time of the decision. See Herzog, *Bankruptcy Law, Modern Trends*, 36 JNL. OF THE NAT. ASSN. OF REFS. IN BANKRUPTCY 18 (January, 1962); 14 STANFORD L. REV. 380 (1962); 40 TEXAS L. REV. 569 (1962).

Affirming the Referee and the District Court, the Court of Appeals in the present case applied the sound reasoning of these authorities to avoid the predicament of the First and Third Circuits, which felt that the language of the pertinent parts of the Internal Revenue Code and the Bankruptcy Act rendered their patently inequitable decisions inescapable.

Before the present case had been decided, other courts had begun to limit and isolate the inequitable doctrine of *Sussman*. See *In re Goodson*, 208 F. Supp. 837 (S. D. Calif. 1962), where the trustee acquired the bankrupt's claim for excessive withholding tax even though a refund was not determinable until after filing of the petition; and *In re Gignac*, 222 F. Supp. 557 (N. D. N. Y. 1963), where the trustee was allowed to credit estimated tax payments against the government's deficiency claim even though under the Internal Revenue Code, the credit is to be applied against self-employment tax liability at the end of the year.

The present holding that the right to a refund, although contingent as to amount, is transferable property within the meaning of Sec. 70a, implements the Congressional intent to secure to creditors all property of a bankrupt, *In re Baudauine*, 96 Fed. 536 (1899), rev. on other grounds, 101 Fed. 574 (1900); and it is consistent with the principle that a statute must be interpreted in light of its purpose, *In re Cantelo Mfg. Co.*, 185 Fed. 276 (1911). Certainly Congress did not intend that a bankrupt could emerge from the bankruptcy proceedings freed from his creditors and, as against them, vested with a fund which came into being as a result of the losses that precipitated the bankruptcy. Bankruptcy Courts are courts of equity, and should exercise equitable powers to the end that technical considerations will not prevent substantial justice from being done (*Pepper v. Litton*, 308 U.S. 295 (1939)) as was the case in *Sussman* and *Fournier*.

Rules of statutory interpretation, the manifest intent and purpose of the Bankruptcy Act, the abundant case authority (referred to in the opinion below) that a claim does not become a mere expectancy because it must be allowed by some authority, and plain justice and equity as between the bankrupts and their creditors, all compel the correctness of the decision below. The articles above mentioned which appeared following the *Sussman* decision, and the decision of the court below itself, clearly lead to a strong indication that the previous *Sussman* and *Fournier* decisions have little likelihood of continued application.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin S. Sloman, attorney for William J. Rochelle, Jr., respondent herein, and member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing brief in opposition on the petitioner by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for petitioner at his post office address of record herein.

Dated: February 3, 1965.

Marvin S. Sloman

MARVIN S. SLOMAN